IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-910

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

Petitioner,

—v.—

CITIES SERVICE OIL CO., *et al.*,

Respondents.

PETITIONER'S REPLY MEMORANDUM

LOUIS NIZER
WALTER S. BECK
GERALD MEYER
NEIL A. POLLIO
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York
10019

THOMAS M. BERGSTEDT
SCOFIELD, BERGSTEDT & GERARD
1114 Ryan Street
P. O. Box 1136
Lake Charles, Louisiana
70601

J. BOND SMITH, JR.
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York
10005

HENRY J. READ
MONTGOMERY, BARNETT, BROWN & READ
806 First National Bank of Commerce Building
New Orleans, Louisiana
70130

DAVID STONE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana
70130

Attorneys for Occidental of Umm Al Qaywayn, Inc., Petitioner

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Three decisive points of law made in the Petition are not challenged in the respondents' Brief in Opposition:

1. The three-mile limit to the territorial sea of nations is a rule of law proclaimed by the United States and binding on American courts.
2. This rule of law applies to the island of Abu Musa, regardless of who owned that island.
3. Disputes concerning this rule of law are justiciable under Article III of the United States Constitution.

It is therefore conceded as a matter of law that Occidental's oil find, located nine miles from Abu Musa, was and is outside the territorial sea of respondents' grantors.

This conclusion alone requires reversal of the Court of Appeals because its demonstrates that there is a justiciable issue and that there is no "Political Question".

Confronted with this simple logic, the respondents have attempted to evade the law. They advance the fanciful and extravagant assertion that the island of Abu Musa, which is not much bigger than Central Park, has a continental shelf of its own, radiating beyond its territorial sea. This invention exists only in the imaginings of the respondents. It is inconsistent with every fact of this case, and it is contrary to every applicable principle of international law and usage, applied in the Persian Gulf and throughout the world.

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In a substantive sense, the respondents have defaulted. To fill the vacuum they resort again to irrelevant diversions, steeped in complexity, which have not disserved them thus far. We cannot therefore ignore them. Lest our engagement with false issues and erroneous statements blur the focus of the real, simple issues, we answer them in a separate section under the heading APPENDIX.

I.

THE SEIZURE OF OCCIDENTAL'S OIL FIND WAS BASED SOLELY ON THE ILLEGAL EXTENSION OF THE 3 MILE TERRITORIAL WATER LIMIT TO 12 MILES AND NOT ON ANY NOTION OF CONTINENTAL SHELF.

The facts of this case simply will not support the notion that the tiny island of Abu Musa had continental shelf rights extending beyond its territorial waters. This is not a case of mere failure of the sovereigns to assert continental shelf rights, as the respondents would have the Court believe. The facts are utterly irreconcilable with respondents' suggestion. In the understanding of the sovereigns and of Buttes itself, Abu Musa had no such continental shelf rights. The only basis for seizure of Occidental's oil find was the illegal extension by Sharjah and Iran of their *territorial waters*:

1. The 1964 seabed border agreement between Sharjah and Umm, approved by Great Britain, is based upon a map showing that *Abu Musa had no continental shelf rights beyond its territorial sea.*[1]

2. The concession granted by Umm to Occidental in 1969, with the approval of the British Government, extended to the *territorial water limits of Abu Musa.*[2]

3. The concession granted by Sharjah to Buttes six weeks later, in December 1969, also "conformed to the 1964 treaty", Opinion of the Court of Appeals, 577 F.2d at 1199, *and therefore was necessarily bounded by the limit of Abu Musa's territorial waters.*[3]

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[1] The 1964 seabed border agreement, as the Court of Appeals found, "was embodied in an admiralty map establishing the continental shelf of Umm as extending to the three-mile territorial waters of Abu Musa". Opinion of the Court of Appeals, 577 F.2d at 1199. Obviously, therefore, neither Sharjah, Umm, or Great Britain considered that Abu Musa had an independent continental shelf.

[2] "The boundaries to [Occidental's] concession conformed to those established by Umm by the treaty with Sharjah of 1964. The British Foreign Office ratified the concession agreement as a condition precedent required under the protectorate." Opinion of the Court of Appeals, 577 F.2d at 1199.

[3] The Sharjah-Buttes concession included the whole of Sharjah's continental shelf. The British Government approved the Sharjah-Buttes concession on the basis that it did not infringe upon the Umm-Occidental concession, as defined by the map approved by the British Foreign Office. (Petition for Certiorari, Appendices C and D.)

4. Buttes' press release announcing the award of the Sharjah concession demonstrates that Buttes itself understood that its concession did not conflict with Occidental's concession, and therefore *could not have extended beyond the limit of Abu Musa's territorial sea.*[4]

5. Sharjah's fraudulent, back-dated decree on which Buttes' claim to Occidental's oil find is based, *speaks only in terms of territorial waters,* and would have been wholly unnecessary if Abu Musa had continental shelf rights in the area of Occidental's oil find.[5]

6. A "Supplementary Decree" issued by Sharjah on April 5, 1970, shortly after it announced its "unpublished" back-dated decree, also *speaks only of territorial waters.*

7. Shortly after announcement of the back-dated decree, Sharjah and Buttes amended their concession. *The only change made by the amendment was the addition of an express reference to twelve-mile territorial waters.*[6]

[4] "Buttes' concession is bounded on the north and east by a recently awarded concession to Occidental Petroleum . . . ." Buttes' Press Release dated December 30, 1969.

[5] The fake Sharjah decree (which both Great Britain and the United States promptly rejected in writing) purported "to extend its territorial waters from three to twelve miles, including those of Abu Musa. This unilateral decree did substantial violence to the 1964 treaty. . . ." Opinion of the Court of Appeals, 577 F.2d at 1199.

[6] The amendment merely changed the definition of "concession area" by adding after the words "territorial waters of the said islands" the parenthetical phrase "(said territorial waters extending twelve nautical miles from the base lines on the mainland and on said islands)". The original Sharjah-Buttes concession already included Sharjah's whole continental shelf. If Abu Musa had independent continental shelf rights to the area of Occidental's oil find, the amendment of the concession would have been pointless and unnecessary.

8. The British Government promptly rejected Sharjah's effort to grab a portion of Umm's continental shelf. The letter to the Ruler of Sharjah from the British Political Agent *speaks solely in terms of territorial waters.*[7]

9. The claim of Iran to the area of Occidental's oil find was based solely on Iran's unilateral illegal contention of *"twelve-mile territorial waters".*[8]

10. The Memorandum of Understanding executed by Sharjah and Iran four days before termination of the British special treaty relations merely grants to Buttes the right to exploit minerals of Abu Musa *"beneath its territorial sea".*[9]

[7] "As a matter of international law, it is not right for a state *simply to extend its territorial waters* regardless of the consequences on its neighbors. * * * It is not right simply to ignore the existence of the *sea boundary* and the concession area of Occidental of Umm al Qaiwain." Letter to Ruler of Sharjah from J. L. Bullard, British Political Agent, dated May 16, 1970. (Emphasis added)

[8] The National Iranian Oil Company so wrote in a letter to Occidental in 1970. Shortly thereafter, the National Iranian Oil Company once again wrote to Occidental, to "reaffirm" Iran's position concerning the rights of Iran "over . . . *its twelve-mile territorial waters*" and over Abu Musa. (Emphasis added)

[9] The Memorandum, dated November 26, 1971, provides that neither Iran nor Sharjah would recognize the claim of the other to Abu Musa; that both would recognize the breadth of the island's territorial sea as twelve miles; and that Buttes would conduct "exploitation of the petroleum resources of Abu Musa *and of the seabed and subsoil beneath its territorial sea".* (Emphasis added)

11. On the date of the Sharjah-Iran Memorandum of Understanding, the president of Buttes wrote a letter to the National Iranian Oil Company, expressly confirming the understanding that Buttes would conduct "exploitation of the petroleum resources of Abu Musa *and of the seabed and subsoil beneath its territorial sea*". (Emphasis added)

12. The Government of Iran confirmed these arrangements "with respect to Abu Musa *and its territorial sea*".[10] (Emphasis added)

The exclusive basis for seizure of Occidental's oil find was, therefore, the claim of Sharjah and Iran to a twelve mile territorial sea. The continental shelf rights of Abu Musa are an afterthought concocted for purposes of this lawsuit.

[10] The National Iranian Oil Company sent a letter to Buttes dated November 27, 1971, reading in its entirety as follows:

> Pursuant to the acceptance of certain arrangements with respect to Abu Musa *and its territorial sea*, I confirm that National Iranian Oil Company on behalf of the Government of Iran accepts that your company or its subsidiaries can proceed with operations under the terms of your letter of 23 November 1971. (Emphasis added)

II.

RESPONDENTS' CONTENTION CONCERNING THE CONVENTION ON THE CONTINENTAL SHELF IS JUSTICIABLE AND WOULD BE FOUND GROUNDLESS.

Respondents raise on appeal the unprecedented claim that the 1958 Convention on the Continental Shelf confers on the tiny island of Abu Musa seabed mineral rights beyond its territorial sea. The Court of Appeals held that this contention presents a non-justiciable political question.

The Convention on the Continental Shelf is a treaty of the United States.[11] Cases arising under it are the subject of mandatory Federal jurisdiction. "The judicial Power shall extend to all Cases . . . arising under . . . Treaties . . ." U.S. Const. Art. III, §2.

Despite the mandate of Article III, the court below found the legal issues presented by Respondents' contention to be "unmanageable" and therefore non-justiciable under *Baker* v. *Carr*, 369 U.S. 186 (1962). This application of the manageability standard is error, for this court elsewhere in *Baker* v. *Carr* made clear that Federal courts can construe a treaty in a manner not inconsistent with subsequent Congressional legislation. *Id.* at 212. The *Sabbatino* case specified that where there is a treaty the court must decide suits thereunder.[12] *Id.*, at 428. A court cannot avoid its duty to construe the laws and treaties of the United States by assuming them "unmanageable".

[11] The Convention on the Continental Shelf was ratified by the United States and proclaimed by the President as taking effect as of June 10, 1964; 15 U.S.T. 471, TIAS 5578, 499 U.N.T.S. 311.

[12] This Court limited the holding of *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964), to disputes "in the absence of a treaty . . . regarding controlling legal principles".

The 1958 Convention on the Continental Shelf gives coastal states sovereignty over minerals on the continental shelf. Where two or more coastal states share a continental shelf, the Convention provides rules for setting a boundary. These rules patently place Occidental's oil find within the exclusive jurisdiction of Umm, Occidental's grantor.[13]

Respondents argue that under the Convention, islands may have continental shelf rights, and then conclude that every island, no matter how insignificant, has its own continental shelf. This contention makes nonsense of the Convention and is contrary to universal practice. England, Ireland and Greeenland are islands but clearly, in the implementation of the Convention, are not equated with the numerous islets that exist in the Persian Gulf and elsewhere. Respondents, by ignoring this distinction, have seized upon the general language of Article I(b) of the Convention to justify their grotesque interpretation that continental shelf rules designed for countries, also apply to islets.[14] Respondents thus distort the broad language of the

[13] Pursuant to Article VI (1) of the Convention on the Continental Shelf, the delimitation of the continental shelves between countries with coastlines opposite to each other is, in the absence of agreement, the median line between the two coasts. Occidental's oil find lies approximately 10 miles within Umm's side of the median line between the coasts of Iran and Umm. In accordance with Article VI(2) relating to adjacent coastal states, the seabed border between Umm and Sharjah was established by the 1964 agreement. Occidental's oil find lies approximately four miles on Umm's side of that border.

[14] Respondents cite the Channel Islands Arbitration in support of their claim for a continental shelf of Abu Musa. (United Kingdom of Great Britain and Northern Ireland and the French Republic, Court of Arbitration); (June 30, 1977) (The English Channel Arbitration); see also Note: "The United Kingdom-France Continental Shelf Arbitration" in 72 American Journal of International Law 95 (1978).

In the Channel Islands Arbitration, the Court drew a clear distinction between "small islands" and the Channel Islands which, the Court found, "possess[ed] a considerable population and a

Convention in an effort to avoid the three-mile rule of the territorial sea.

In support of the ludicrous claim that Abu Musa should "share" the continental shelf with the coastal states "on usual median-line principles", respondents (at pp. 5 and 11 of their Brief) cite maps and studies prepared by the Geographer of the State Department. Examination of all 32 maps cited reveals *not a single case* in which an island comparable to Abu Musa has shared a coastal state's continental shelf through "usual median-line principles." The six maps dealing with the Persian Gulf[15] show that many islands like Abu Musa are simply disregarded in delimiting the continental shelf.[16] Where the Persian Gulf islands are

substantial agricultural and commercial economy" as well as being "clearly territorial and political units which have their own separate existence, and which are of a certain importance in their own right separately from the United Kingdom" and "enjoy[ing] a very large measure of political, legislative, administrative and economic autonomy". (id. par. 184). Under these criteria, the tiny and sparsely populated Abu Musa without any administrative independence, commerce or industry, can hardly be compared with the important, prosperous and administratively independent Channel Islands. Abu Musa is populated by some 800 subjects of Sharjah. Compare the Channel Islands: Guernsey, population—47,000; Jersey—population 63,000.

Northcutt Ely, one of respondents' counsel on Respondents' Brief in Opposition has published an article demonstrating the absurdity of applying continental shelf rules to an "isolated islet" with the effect of attributing to its owner "areas of the seabed extending possibly hundreds of miles from its small coast and encompassing seabed areas which are thousands of times as great as the islet's land area." Northcutt Ely, *Seabed Boundaries between Coastal States; The Effect Given to Islets as "Special Circumstances"*, Int'l Lawyer, vol. 6, no. 2 at 219.

[15] U.S. State Department, Office of the Geographer, "Limits in the Seas," Nos. 12, 18, 24, 25, 63 and 67.

[16] *See e.g. id.*, No. 12, which shows the continental-shelf boundary between Saudi Arabia and Bahrain. The Geographer's analysis notes that "small islands between the coasts were not utilized in determining the midpoint between Bahraini and Saudi Arabian territory"; *id.*, No. 25, where the Geographer notes that "the pres-

not ignored entirely, the controlling principle in determining the seabed boundary is the islands' territorial sea.[17]

The map annexed to Occidental's concession agreement (Petition Appendix C) clearly follows the settled rule for determining continental shelf boundaries in the Persian Gulf. Moreover, the latest scholarship on this question shows the continuing application of the territorial sea as the measure of small islands' mineral rights.[18]

Three conclusions follow from this analysis:

1. That the three-mile rule is untouched by the specious new argument to extend it illimitably on the pretext of a continental shelf.

2. That by treaty and international law as well, the issue raised by respondents' argument, no matter how groundless, is justiciable.

3. And even more, that as a matter of law the theory of a "Political Question" derived from respondents' argument is inapplicable and must be rejected.

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ence of all islands in the Persian Gulf was disregarded" in the continental shelf boundary between Iran and Qatar.

[17] *See e.g. id.*, No. 18, which shows a situation strikingly similar to Umm and Sharjah. The continental shelf boundary between Abu Dhabi and Qatar—two other states on the Trucial coast—forms a semicircle around an island in the middle of the Gulf. The Geographer describes this semicircle as "an arc around Dayyinah [an Abu Dhabi island] which marks the three-mile territorial sea of the island." Similar arcs determined by the *territorial sea* of islands comparable to Abu Musa appear in No. 24 (Iran-Saudi Arabia), No. 63 (Iran-Dubai) and No. 67 (Iran-Oman).

[18] See e.g., D. Karl, *Islands and the Delimitation of the Continental Shelf: a Framework for Analysis*, 71 Am.J. Int'l L. 642 (1977). Karl points out (at p. 660) that an island located outside of the territorial waters of the state to which it belongs "should not be used as a basepoint, nor should it be given any other effect in the delimitation other than the allocation of its *territorial sea*".

CONCLUDING DISCUSSION

The advice of the counsel to the State Department derailed the inevitable conclusion that this case should be tried on its merits. The theory of a "Political Question" was bowed to for the first time in the Court of Appeals. Mistakenly it was thought that Iran's rights were affected. We have shown that irrespective of who owned Abu Musa, Iran's royalties, past or future, from the oil find would not suffer one cent, nor its boundary lines, nor any other rights of Iran, Sharjah, or any other state. Only the attached property in the United States before the Court could be affected.

Aside from the falsity of the fear, we decried judicial abstention based on what we described as "transistory" consideration of State Department policy in an "ever changing configuration of foreign powers". How transitory! Since our Petition was filed, the Shah no longer rules, and Americans are fleeing Iran. The rationalization of a "Political Question" has vanished; and Hickenlooper's moral mandate to remove the stigma of "thieves market" remains.

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A pronouncement of this Court that citizens may have access to our judicial system to determine rights to confiscated property brought into our borders, is desperately needed. It would do away with confusion and uncertainty.

To stimulate exploration of new energy sources is a vital national interest. The risk of such search is high. (Occidental's cost of seismographic exploration alone in this case was millions of dollars). What would be more discouraging to an investor than to know that even if he is successful, an avaricious competitor may seize his find and use the United States as a haven to protect him from the victim?

In a world seething with terrorism, hijacking and seizure of property, respondents' assertion that court doors should be closed to victims needs review and reversal.

Congress expressed its view clearly in the Hickenlooper Amendment. The Court of Appeals has changed the words "no court shall decline" to decide a case—to read "a court *must* decline" to decide a case. Many litigants and courts will be perplexed by this holding and will await this Court's guidance towards legal and moral imperatives.

Respectfully submitted,

LOUIS NIZER
WALTER S. BECK
GERALD MEYER
NEIL A. POLLIO
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York
10019

THOMAS M. BERGSTEDT
SCOFIELD, BERGSTEDT & GERARD
1114 Ryan Street
P. O. Box 1136
Lake Charles, Louisiana
70601

J. BOND SMITH, JR.
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York
10005

DAVID STONE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana
70130

HENRY J. READ
MONTGOMERY, BARNETT, BROWN & READ
806 First National Bank of Commerce Building
New Orleans, Louisiana
70130

Attorneys for Occidental of Umm Al Qaywayn, Inc., Petitioner

APPENDIX

As to the respondents' argument that Hickenlooper does not protect mere contract claims:

Occidental's forty-year exclusive oil concession is not a mere contract claim, but is clearly property, and is so classified under international law, the law of civilized nations, and the laws of every state of the United States, including Louisiana. Even the respondents have conceded this issue below.

> "... a 40 year exclusive right to explore for and exploit oil and gas is a substantial property interest in American law [citing cases] * * * that Occidental's concession right was a sufficient interest for Hickenlooper purposes is equally plain." (Respondents' Reply Brief in the District Court in Support of Motion to Dismiss and/or for Summary Judgment, p. 17.)

As to the respondents' argument that Occidental took its concession subject to a boundary dispute between sovereigns, and could get no better title than that of its grantor, Umm Al Qaywayn:

The respondents cite various cases for the proposition that interests conferred by a sovereign in lands that are claimed by another sovereign are taken subject to resolution of the conflicting sovereign claims. Respondent's Brief in Opposition, p. 27. This is not the law. Where territory changes from one sovereign to another the change is subject to vested rights existing at the time. Any confiscation without compensation is a clear violation of International Law.

As to the respondents' argument that Occidental is barred from recovery because Umm purported to cancel its concession:

Umm purported to cancel Occidental's concession in June 1973, some eighteen months after Umm had been ousted from sovereignty and the concession had been confiscated. When it lost sovereignty, Umm lost power and jurisdiction over the area, and had no more authority to terminate Occidental's concession than did the president of Nicaragua. Occidental paid rentals at the rate of $1,000,000 per year until the confiscation occurred. It was surely not obligated to pay rentals to Umm or anyone else after the concession was confiscated. In any event, this is a fact issue that requires a trial.

As to the respondents' argument that the prior California antitrust case should be given res judicata effect here:

The district court rejected the respondents' plea of res judicata. The California antitrust case was filed and dismissed before the annexation of Occidental's concession area, before the confiscation of the concession, and before shipment of oil into the United States. The California court refused to apply Hickenlooper, since no actual confiscation had occurred at that time. The present action, which is based on the occurrence of a confiscation and shipment of proceeds into the United States, is a different cause of action from the antitrust suit brought years before and moreover could not have been brought at the time the first suit was dismissed, since the requisite facts had not yet occurred. Therefore, the California suit has no res judicata effect in this case. *Restatement of Judgments,*

Section 54 (1942). See also *Lawlor* v. *National Screen Service Corporation,* 344 U.S. 322, 326 (1955).

As to the respondents' argument that the prior California action should be given collateral estoppel effect in this case:

The district court also rejected this argument. The factors that bar application of res judicata here also foreclose application of collateral estoppel. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591 (1948). See also: 1B *Moore's Federal Practice,* ¶ 0.448 at p. 4232.

As to the respondents' argument that the act of state doctrine applies because the complaint "calls into question" acts and motives of foreign states:

This is not so. The only act of state that Occidental asks the court to hold illegal is the confiscation of its concession. The other sovereign acts alleged in the complaint are merely facts, whose legality is not at issue. The act of state doctrine relates solely to the adjudication of the *illegality* of acts of foreign sovereigns. *Underhill* v. *Hernandez,* 168 U.S. 250 (1897). Moreover, the Hickenlooper Amendment prohibits the Court from declining to decide this case on the ground of the act of state doctrine.

As to the respondents' argument that Sharjah and Iran are indispensable parties:

The district court below rejected the respondents' argument of indispensability. The Court correctly observed that "[As] to Sharjah and Iran, the alleged confiscating sovereigns, a holding of indispensability would render illusory the very rights that the Hickenlooper Amendment

seeks to preserve". 396 F. Supp. at 468. Because of jurisdictional impediments and sovereign immunity, if a confiscating sovereign were indispensable Hickenlooper could never be invoked unless the sovereign voluntarily joined the action.

In the language of Rule 19, there is no basis upon which the court can reasonably conclude that this action should "in equity and good conscience" be dismissed because of the absence of Sharjah and Iran. The complaint seeks only recovery of the oil, and seeks no relief against Sharjah or Iran, who have already received and will continue to receive the royalties payable with respect to the oil. A judgment recognizing Occidental's right to the converted oil would not threaten the present sovereignty of Sharjah and Iran over the valuable portion of Occidental's concession area, which they now permanently occupy.

In *Zwack* v. *Kraus Bros. & Company,* 237 F.2d 255 (2d Cir. 1956), the Second Circuit Court of Appeals held that a confiscating power is not indispensable in an action by the victim to recover the property taken because the taking of private property without compensation "offends the morals and violates the public policy of the United States". (237 F.2d at 258).

As to the respondents' argument that Umm Al Qaywayn is indispensable:

The district court also properly rejected this argument. The judgment sought in this case, recovery of oil brought into the United States, requires merely a finding that Umm Al Qaywayn was sovereign when Occidental's concession

was granted, and that Occidental's concession was valid and in effect at the end of 1971 when Umm was ousted from sovereignty and the concession was confiscated. The complaint seeks no relief against Umm and no interest of Umm is at stake.